Supreme Court, U.S.
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No. 02-1784

In The

Supreme Court of the United States

ALBERTO SALDAJENO, *et al.*,

Petitioners,

v.

ISHIHARA SANGYO KAISHA LTD., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSEPH W. COTCHETT
STEVEN N. WILLIAMS
COTCHETT, PITRE, SIMON & MCCARTHY
840 Malcolm Road
Burlingame, CA 94010
650-697-6000

MICHAEL E. WITHEY
STRITMATTER KESSLER WHELAN WITHEY COLLUCIO
200 Second Avenue West
Seattle, WA 98119
206-448-1777

LOURDES SANTOS TANCINCO
TANCINCO LAW OFFICE
One Hallidie Plaza, Suite 818
San Francisco, CA 94102
415-397-0808

ROBERT HARWOOD
WESCHSLER HARWOOD LLP
488 Madison Avenue, 8th Floor
New York, NY 10022
212-935-7400

Counsel for Petitioners

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred by affirming a dismissal pursuant to Fed. Rule of Civil Procedure 12(b)(6) of claims brought pursuant to Cal. Code Civ. Proc. 354.6, by which the State of California sought to provide a forum for Filipino-Americans to recover damages for having been forced to perform slave labor for private Japanese businesses?

2. Whether the Petitioners possess inalienable rights to be free from violations of fundamental human rights which could not be waived by the 1951 Treaty of Peace?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties in the court below: Alberto Saldajeno, Acelopio Galedo, Generoso Jacob, Ishihara Sangyo Kaisha, Ltd., Ishihara Corporation (USA), Taiheiyo Cement, Onoda USA, Ernesto Santo Domingo, Imelda Santo Domingo, Perfecto Llanza, Mitsui & Co. (USA), Inc., Mitsui Mining Co., Ltd., Mitsubishi Corporation, Nippon Steel Corp., and Nippon Steel USA Inc.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND TREATIES INVOLVED	2
STATEMENT OF THE CASE	5
PROCEDURAL HISTORY	9
REASONS FOR GRANTING THE WRIT	11
I. Petitioners' Claims Are Not Barred	11
II. Claims Against Private Japanese Corporations That Used Slave Labor Are Not Barred by the "War" Power	11
III. The Rights of Petitioners That Have Been Violated by Respondents are *Jus Cogens* or Peremptory Norms of International Law That Are So Fundamental They Cannot Be Abrogated by Any Treaty or Agreement	21
IV. The Ninth Circuit Erred in Holding That Petitioners' Claims Are Barred by the Statute of Limitations	27
V. Conclusion	28

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

art. III, § 2 24

art. VI, cl. 2 24

STATUTES AND RULES

50 U.S.C. app. 611 (Supp. IV 1941) 18

The Act of February 19, 1879, ch. 90, 20 Stat. 316 (1879) 17

The Act of August 7, 1946, ch. 864, 60 Stat. 902 (1946) (the "Lucas Act") 19

War Powers Act, § 201, 55 Stat. 838, 839 (1941); 50 U.S.C. app. 611 (Supp. IV 1941) 18

Cal. Code Civ. Proc. § 354.6 ..... *passim*

Cal. Code Civ. Proc. § 354.6(a)(2) 6

Cal. Code Civ. Proc. § 354.6(c) 7

CASES

Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988) 22, 26

Conley v. Gibson, 355 U.S. 41 (1957) 12

Cost Management Services Inc. v. Washington National Gas Co., 99 F.3d 937 (9th Cir. 1996) 12

Emory v. United States, 19 Ct. Cl. 254 (1894) 14, 17, 18

Fernandez-Rodriguez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980) 24

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) 24

TABLE OF AUTHORITIES – Continued

Page

Frankel v. Eder, 185 Misc. 274, 56 N.Y.S.2d 727 (1945)....19, 20

General Wagener, Revista Penale 753 (Sup. Mil. Trib., Italy 1950)....23

Geofroy v. Riggs, 133 U.S. 258 (1890)....20

In re World War II Era Japanese Forced Labor Litigation, 114 F. Supp.2d 939 (N.D. Cal. 2000)....9

In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp.2d 1153 (N.D. Cal. 2001)....9

Jeong v. Onoda Cement Co. Ltd., 2000 U.S. Dist. LEXIS 7985 (C.D. Cal. 2000)....15

Kawakita v. United States, 343 U.S. 717 (1952)....15, 16

Mitchell v. United States, 24 Ct. Cl. 399 (1889)....18

Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)....24

Prosecutor v. Tadic, Int'l Crim. Tribunal for the Former Yugoslavia, IT-94-1-AR72 (Appeals Chamber, Oct. 2, 1994)....23

Richardson v. United States, 114 Ct. Cl. 695 (1949)....19

Rocca v. Thompson, 223 U.S. 317 (1912)....13

Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992)....21, 22, 23

Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801)....24

The Nereide, 13 U.S. (9 Cranch) 388 (1815)....24

The Nuremberg Trial, 6 F.R.D. 69 (Int'l Military Tribunal 1946)....22

The Paquete Habana, 175 U.S. 677 (1900)....24

TABLE OF AUTHORITIES – Continued

Page

The Schooner Amistad, 40 U.S. (15 Pet.) 519 (1841) 22

United States of America v. Alfred Felix Alwyn Drupp von Bohlen und Halbach, IX Trials of War Council Law No. 10 (1950).....22

United States of America v. Carl Krauch, VIII Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952) 23

United States of America v. Friedrich Flick, VI Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council No. 10 (1952).....23

United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995).....22, 23

United States v. North, 112 U.S. 510 (1884).....18

Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).....25, 26

TREATY OF 1951

Article 14(b).....12, 13, 14, 20

Article 19.....14, 20

Article 19(a).....14, 15

OTHER AUTHORITIES

1A Singer, *Sutherland on Statutory Construction*, § 32.08 at 572 (4th ed. 1984).....13

1 Op. Atty. Gen. 26 (1972).....24

Black's Law Dictionary 1298 (6th ed. 1990).....12

TABLE OF AUTHORITIES – Continued

Page

Jordan J. Paust, Joan M. Fitzpatrick, and Jon M. Van Dyke, *International Law and Litigation in the U.S.* (2000).....23, 24

Legislative Counsel's Digest for Senate Bill 1245..... 8

Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindler,"* 9 Temp. Int'l & Comp. L.J. 173 (1995).....23

Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. n (1987).....22

Treaty of Paris of 1783.....25

Vienna Convention, art. 31(4).....17

Vienna Convention, art. 53.....21

Vienna Convention, art. 64.....21

PETITION FOR WRIT OF CERTIORARI

Petitioners **Alberto Saldajeno**, **Acelopio Galedo**, **Generoso Jacob**, **Ruben Resus**, **Perfecto Llanza**, **Ernesto Santo Domingo** and **Imelda Santa Domingo** respectfully pray that a writ of certiorari be issued in this case. Petitioners are Filipino-Americans who were forced to labor for private Japanese corporations during the Second World War. The Ninth Circuit, in violation of the United States Constitution, the Law of Nations, and the Federal Rules of Civil Procedure, has affirmed the dismissal of Petitioners' claims, denying them any form of relief. Petitioners seek this Court's review of the unconstitutional decision below in order to protect and enforce the human and civil rights of Petitioners as well as the sovereign powers of the State of California.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of this action is reported at 317 F.3d 1005 (9th Cir. 2003). The Ninth Circuit's order denying rehearing is set forth at pages 20-23 of the Appendix. The decision of the District Court dismissing the Filipino claims is reported at 164 F. Supp.2d 1153 (N.D. Cal. 2001).

JURISDICTION

The action was originally filed in the Superior Court of the State of California, County of San Francisco, and removed by Respondents to the United States District Court for the Northern District of California on the

grounds of federal question jurisdiction. The judgment of the district court dismissing Petitioners' complaint was entered on September 28, 2001. A timely notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed on October 19, 2001 in the *Saldajeno* and *Santo Domingo* cases. As set forth above, the Ninth Circuit issued a decision affirming the dismissal on January 21, 2003, and an order amending the decision and denying rehearing on March 6, 2003 (see pages 15-23 of the Appendix).

CONSTITUTIONAL PROVISIONS, STATUTES AND TREATIES INVOLVED

United States Constitution, Art. I, § 8, clauses 1, 3, 10-14 provide:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces; . . .

United States Constitution, Art. II, § 2, clauses 1-2 provide:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

California Code of Civil Procedure § 354.6 provides:

(a) As used in this section:

(1) "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(2) "Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) "Compensation" means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation.

(b) Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World

War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

Peace Treaty of 1941, § 14(b)

> Except as otherwise provided in the present Treaty, the Allied Powers waive [1] all reparations claims of the Allied Powers, [2] other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and [3] claims of the Allied Powers for direct military costs of occupation.

STATEMENT OF THE CASE

This petition seeks to remedy the deprivation of Petitioners' fundamental human rights, and the consequent unjust enrichment of Respondents, which resulted from the orders of the courts below dismissing Petitioners' complaint. The right to be free from slavery is perhaps, after the right to life, the most fundamental of human rights. Petitioners sought redress for this violation from

Respondents, private corporations which profited – and retained the profits – from Petitioners' forced labor. The deprivation of rights from which this case arises, and the disregard for that deprivation and for California's efforts to provide a forum for redress, cry out for correction by this Court. The Ninth Circuit erred by placing its gloss of historical events on the factual record, and in that manner violated the Federal Rules of Civil Procedure.

Petitioners are Filipino-Americans who were forced by Respondents to perform labor under inhuman conditions in the Phillippines during World War II. Petitioners suffered inhumane physical and mental torture and received starvation rations, no medical care, and no compensation of any kind for their work.

In order to provide redress to victims of Japanese corporate forced labor such as Petitioners, the Legislature of the State of California enacted California Code of Civil Procedure § 354.6, which extended the period in which any person could file an action seeking recovery against entities for which they performed forced labor during the Second World War. The statute provides that any "*Second World War forced labor victim*" may bring an action to recover "compensation" from any entity (or its successor in interest) for whom that labor was performed, either directly or through a subsidiary or affiliate. *Id.* "*Second World War forced labor victim*" is defined as "any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, . . . forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." Cal. Code Civ. Proc. § 354.6(a)(2).

The statute extends the statute of limitations for such actions for ten years to December 31, 2010 in recognition of the passing of this generation of men. Cal. Code Civ. Proc. § 354.6(c). The full text of the statute is set forth in the immediately preceding section.

Private Japanese businesses were operating in the Phillippines before the Japanese invaded the Phillippines on December 8, 1941. After the Japanese army invaded the Phillippines, private companies forced Petitioners to work for them as slave and forced laborers.

Petitioners worked oppressive hours in mining and farming, with little nutrition. They were forced to perform back-breaking manual labor under extraordinarily harsh and dangerous conditions. **Alberto Saldajeno**, now 83 years old and a resident of Daly City, was forced to labor at a copper mine owned by **Ishihara Sangyo. Acelopio Galedo**, now 81 and a resident of San Francisco, was forced to build a road for **Ishihara Sangyo's** copper mine. **Genoroso Jacob**, now 80 years old and a resident of San Francisco, was forced to work in a coal mine owned by **Taiheiyo Kogyo** (now **Taiheiyo Cement**) where he was repeatedly beaten. **Ernesto Santo Domingo**, who has passed away since this action was filed, was 16 years old when he was forced to labor without pay in the copper mines owned by **Ishihara Sangyo**. He suffered physical and emotional abuse, and contracted malaria and dysentery while forced to labor.

Workers such as Petitioners were provided by the Japanese government at the request of private industry. The private companies would also kidnap people they found in public, herd them into trucks, and force them to work. One of the means that the private companies used to force Petitioners to work for them was to threaten their families with death.

Conditions in the mines were very dangerous. Cave-ins, tunnel collapses, and other threats were frequent, in large part due to the crude conditions in which the Petitioners were forced to work. Men, women, and children were forced to work, and were beaten if they failed to meet their quotas. Those who refused to perform labor were subject to being hunted, arrested, and tortured.

Section 354.6 was enacted to provide a means for slave and forced labor victims like Petitioners to seek redress in a court of law. The Legislative Counsel's Digest for Senate Bill 1245 states:

> This bill would authorize any World War II slave labor victim or World War II forced labor victim, or heir of the victim, to bring an action in superior court to recover compensation, as defined, from any entity or successor in interest thereof, for whom the labor was performed, either directly or through a subsidiary or affiliate. It would provide that any action brought under these provisions shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is commenced on or before December 31, 2010.

Section 1(c) of the same Legislative Counsel's Digest provides the policy reasoning for this Legislation:

> (c) California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War.

PROCEDURAL HISTORY

On August 2, 2000, Petitioners in Saldajeno filed their Complaint against Respondents in the San Francisco County Superior Court. The Complaint in the Santa Domingo action was filed on October 11, 2000, also in the San Francisco County Superior Court. Respondents filed Answers to the Complaints, and removed them to the United States District Court for the Northern District of California. On June 5, 2000, the Judicial Panel on Multi-District Litigation ("MDL Panel") issued an order transferring 12 related cases that were pending in the Central and Northern Districts of California to Judge Vaughn Walker in the Northern District. On June 26, 2000, Judge Walker issued "Order No. 1" consolidating those 12 cases for pretrial purposes. The Filipino cases were then transferred to Judge Walker, and also consolidated for pretrial purposes.

Following oral argument, the District Court issued Order No. 4 on September 21, 2000, which dismissed with prejudice claims made by Allied POWs against the Japanese companies. *See In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp.2d 939 (N.D. Cal. 2000). In this order, the District Court held the Treaty of 1951 waived claims of all Allied nationals. 114 F. Supp.2d at 945. Second, the Court found that there was no "sustainable distinction" between Japanese corporations and the Japanese government during the war years. 114 F. Supp.2d at 948.

On September 17, 2001 the District Court entered an order dismissing the Filipino cases on the same basis as the Allied POWs. *See In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp.2d 1153 (N.D. Cal. 2001). This order largely incorporated the prior Order No.

4 which dismissed the Allied POW cases. The District Court found that the Philippines was one of the Allied Powers which signed the Peace Treaty, albeit not ratifying it until 1956. *Id.* at 1157. The District Court reiterated its earlier position that it would be a "stretch" to distinguish between the conduct of Japan and the conduct of Japanese companies during the war. *Id.* at 1158.

In an opinion issued on January 21, 2003, the Ninth Circuit affirmed the District Court on the ground that California's law providing redress to Petitioners and people like them intruded upon the "federal government's exclusive power to make and resolve war." The opinion focused on the inhuman suffering and hardship of holocaust victims during the Second World War, rather than on the hardships suffered by Petitioners, and noted that both holocaust victims and United States prisoners of war were provided with mechanisms for – albeit limited – compensation. 317 F.3d 1024-1026. The opinion never mentions any type of compensation program for Filipino-Americans like Petitioners. The Ninth Circuit also ruled that all of the claims at issue were stale ***despite*** the extension of the statute of limitations provided by Cal. Code Civ. Proc. § 354.6. The opinion also noted the "uncertain jurisdictional issues" of cases like Petitioners' that had been removed to federal court, 317 F.3d at 1030, but concluded that lack of federal jurisdiction "could have no effect on the outcome of any of the cases." *Id.*

REASONS FOR GRANTING THE WRIT

I. Petitioners' Claims Are Not Barred

In viewing the claims at issue in this case it is tempting to substitute the perception of history with the factual record. The error of the Court below was its acceptance of a broad and unlimited federal war power that far eclipses the powers of the Commerce Clause; indeed, a power so sweeping that anything tangentially connected to it is swallowed up. The Court below coupled that perspective of Federal power with a historical perception of the Second World War which fails to account for the ***private*** conduct underlying Petitioners' claims. As we now see in the perpetuation of the war in Iraq, a banal commonplace world carries on even during the heights of war. To assume without any exception that any conduct by any Japanese corporation during the Second World War was, in the terms of the governing phrase of this case, "in the prosecution of the war" and to accept this interpretation in deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), was clear error and mandates granting this petition.

II. Claims Against Private Japanese Corporations That Used Slave Labor Are Not Barred by the "War" Power

Petitioners' claims are against private Japanese corporations for their profit-making activities, and not for acts committed in the prosecution of the war. The Courts below have refused to recognize the existence of factual issues concerning whether any of the Respondents' conduct was actually part of the prosecution of the war and thus subject to the War power. By doing so, all factual

inferences were granted in favor of Respondents, contrary to the law. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Cost Management Services Inc. v. Washington National Gas Co.*, 99 F.3d 937, 950 (9th Cir. 1996).

Simple review of Article 14(b) demonstrates that the Peace Treaty was not intended to extinguish Petitioners' rights to sue Japanese companies for their private, profit-making commercial activities. Article 14(b) of the Peace Treaty states:

> Except as otherwise provided in the present Treaty, the Allied Powers waive [1] all reparations claims of the Allied Powers, [2] other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and [3] claims of the Allied Powers for direct military costs of occupation.

Peace Treaty, Article 14(b) (bracket numbers added). Article 14(b) delineates three specific waivers, only one of which is relevant to the instant litigation.

The first is a waiver of all reparations claims of the Allied Powers. In the context of war, "reparations" is defined as "[p]ayment made by one country to another for damages during war." *Black's Law Dictionary* 1298 (6th ed. 1990). This first waiver, therefore, extinguishing the Japanese government's wartime debts to the governments of the Allied Powers, is not applicable here. The last waiver, extinguishing the claims of the Allied Powers for the costs of post-war occupation of Japan, also is not relevant to the instant suits.

The second waiver – at issue here – extinguishes "other claims of the Allied Powers and their nationals

arising out of *any actions taken by* Japan and their *nationals in the course of the prosecution of the war . . . .*" *Id.*, clause 2 (emphasis added). In reading this waiver, this Court is instructed by its prior pronouncements that "treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties." *Rocca v. Thompson,* 223 U.S. 317, 332 (1912).

Recognizing that "a greater degree of professionalism and more painstaking care [is] given to the process of formulating the ideas to be embodied in [a treaty] and in drafting it than is generally the case for domestic statutes," 1A Singer, *Sutherland on Statutory Construction*, § 32.08 at 572 (4th ed. 1984), a court should seek to give meaning and value to each and every word in the Article 14(b), clause 2, provision. Clause 2, on its face, contains an important qualifier: Not all claims for any wartime actions taken by Japanese nationals are waived – rather only those wartime "actions taken . . . in the course of the prosecution of the war."

If the drafters of the Peace Treaty *chose* to limit the waiver to actions taken "in the course of the prosecution of the war," rather than a blanket waiver of *all* acts during the war, there is no basis to conclude that the Federal government intended to prohibit private claims for private conduct from going forward. While the Ninth Circuit held that the Constitution "allocates the power over foreign affairs to the federal government exclusively," 317 F.3d at 1025, certainly the Federal government may choose to permit individuals to recover on private claims – especially when it has provided no form of compensation to these individuals. Forfeiture of such claims would constitute a

denial of due process. Attributing value and meaning to every word, the second waiver, therefore, is only for the rights of claimants to seek redress for injuries inflicted by the Japanese corporations in the active engagement of the war. The phrase "in the course of the prosecution of the war" does not encompass private, commercial activity of the Japanese corporations committed between 1941-1945 – the very activity which forms the basis of this litigation. United States law has been clear on this going back to 1894. *Emory v. United States*, 19 Ct. Cl. 254 (1894).

Although neither Article 14(b) nor any other provision of the Peace Treaty defines "in the course of the prosecution of the war," the meaning of the phrase becomes clear when Article 14(b) is compared to Article 19(a) of the Peace Treaty. Article 19 is the parallel article to Article 14, waiving the claims *of Japan and its nationals* against the Allied Powers and their nationals.

> Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals ***arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.***

Peace Treaty, Article 19 (emphasis added).

Although similarly structured, the difference between these two articles is striking. While the drafters of the Peace Treaty specifically limited the second waiver of Article 14 to actions taken by Japan and its nationals only in the active engagement of the war ("during the course of the prosecution of the war"), the waiver of Article 19 is

expanded to any and all actions taken by the Allied Powers and their nationals during wartime ("arising out of the war or out of actions taken because of the existence of a state of war").

Clearly "actions taken because of the existence of a state of war" is *more* expansive than "action taken in the course of the prosecution of the war." Article 19(a) is more generalized and expansive, requiring only a passive nexus to war-related activity, and not actual activities resulting directly from the prosecution of the war.

Japanese law required designation of war-related businesses. On December 17, 1943 the Japanese government enacted the Munitions Law which allowed the government to designate companies as "munitions companies," appoint and discipline the directors and managers and conscript the employees as government workers. *See Jeong v. Onoda Cement Co. Ltd.,* 2000 U.S. Dist. LEXIS 7985 at 25-26 (C.D. Cal. 2000). Thus, the Japanese themselves have a historical record of which companies the Japanese government officially identified as part of the war effort, and which were not – including the date when the Japanese government enlisted the company in the war effort.

The Munitions Law was construed by the United States Supreme Court in 1952 in *Kawakita v. United States*, 343 U.S. 717, 727-728 (1952) which affirmed a treason conviction of an American citizen who abused United States POWs while employed by a private Japanese company. The defendant, Kawakita, argued that his conduct during the war was coerced and that all Japanese companies were part of the war effort. Justice Douglas

rejected the argument that all Japanese companies should be deemed to be part of the war effort:

> The Oeyama Nickel Industry Co., Ltd., was a private company, organized for profit. It was engaged in producing metals used for war under contracts with the Japanese government. In 1944 it was designated by the Japanese government as a munitions corporation and under Japanese law civilian employees were not allowed to change or quit their employment without the consent of the government. The company's mine and factory were manned in part by prisoners of war. They lived in a camp controlled by the Japanese army. Though petitioner took orders from the military, he was not a soldier in the armed services; he wore insignia on his uniform distinguishing him as nonmilitary personnel; he had no duties to perform in relation to the prisoners, except those of an interpreter. His employment was as an interpreter for the Oeyama Nickel Industry Co., Ltd., a private company. The regulation of the company by the Japanese government, the freezing of its labor force, the assignment to it of prisoners of war under military command were incidents of a war economy. But we find no indication that the Oeyama Company was nationalized or its properties seized and operated by the government. *The evidence indicates that it was part of a regimented industry; but it was an organization operating for private profit under private management.* We cannot say that [Kawakita's] status as an employee of a private company was changed by that regimentation of the industry. (emphasis added)

Kawakita compels the conclusion that the Ninth Circuit's decision must be reversed.

The phrase "in the course of the prosecution of the war" is a term of art. It possesses a special meaning, as indicated by the specific use of the term in statutes and judicial decisions prior to, and during the time, that the Peace Treaty was negotiated.[1] Reference to these cases supports a broader scope of rights than the Ninth Circuit found.

The first reported use of the phrase "in the prosecution of the war" is found in a federal statute enacted in the aftermath of the Mexican-American War. The Act of February 19, 1879, ch. 90, 20 Stat. 316 (1879) (hereinafter "Act of 1879") used the phrase "in the prosecution of the war" to limit the scope of eligibility for extra war-time related compensation. Although all members of the armed services were employed during the war with Mexico, the statute "[p]rovided[] that the provisions of this act shall include . . . soldiers . . . employed in the prosecution of said war." *Id.*

The limiting phrase "in the prosecution of said war" was deemed to possess a meaning equivalent to "in actual service during the war." *Emory v. United States,* 19 Ct. Cl. 254 (1894) (explaining that the Act of 1879 was meant to continue a war service benefit that had lapsed and to allow soldiers as well as volunteers to recover, but was not meant to expand the eligibility requirements to those with an indirect connection to the fighting of the war). Both phrases have been interpreted to mean "'[s]omething more than a mere muster into service. . . . Recruits who had not

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[1] *See* Vienna Convention, art. 31(4) (requiring courts to apply the "special meaning" of a word if the parties so intended).

left the United States for the seat of war, or if they had left it, but had not joined their respective companies, [were] not entitled to the extra pay allowed by the fifth section of the act.'" *Emory,* 19 Ct. Cl. at 260.

Subsequent decisions also show that the phrase possesses a narrow meaning. In *United States v. North*, 112 U.S. 510 (1884), the Supreme Court affirmed a statutory award under the Act of 1879, citing the reasoning in *Emory,* 19 Ct. Cl. at 254. In *Mitchell v. United States*, 24 Ct. Cl. 399 (1889), the court denied the statutory grant of three months salary to a Navy lieutenant who served his time during the Mexican War at a naval base in Philadelphia because the term "employed in the prosecution of said war" in the Act of 1879 *demanded proof* that the lieutenant was "employed in such service as exposed [him], either immediately or prospectively, to danger, risk, or hardship, incident alone to the Mexican War, by actual service therein, to the exclusion of those who, while in the naval service and employed in their ordinary duties, were not in any way subject to those incidents." *Id.* at 401.

The phrase "in the prosecution of the war" was also used in three World War II statutes regulating rights and benefits of commercial contractors engaging in work "in connection with the prosecution of the war" or "necessary to the active prosecution of the war." As demonstrated in the cases cited below, courts are competent to distinguish between production of goods which contribute to the prosecution of war and those that do not. The First War Powers Act, § 201, 55 Stat. 838, 839 (1941); 50 U.S.C. app. 611 (Supp. IV 1941) (hereinafter "War Powers Act"), enabled the President to "authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort" to modify

contracts "whenever he deems such action would facilitate the prosecution of the war." The Act of August 7, 1946, ch. 864, 60 Stat. 902 (1946) (hereinafter "the Lucas Act"), authorizes equitable claims of contractors against the government for losses incurred between September 13, 1940 and August 14, 1945.

Interpreting the Lucas Act, the Claims Court in *Richardson v. United States,* 114 Ct. Cl. 695 (1949), held that the Act was also governed by the limiting clause of the War Powers Act, "in connection with the prosecution of the war effort," and therefore did not extend to all commercial contracts. *Id.* at 669-700. The Richardson court found petitioner's complaint fatally flawed because it failed to allege a sufficient nexus between the contract and the prosecution of the war. *Id.* at 700 (finding loss of profit for numerous contracts including canals, pipelines, and a bridge were an insufficient showing to establish a right to recovery under the Lucas Act).

In *Frankel v. Eder,* 185 Misc. 274, 56 N.Y.S.2d 727 (1945), the Appellate Division of the New York Supreme Court interpreted sections 2 and 8 of chapter 315 of the Laws of 1945, which provided special protection for "war contractors" who are "engaged in war work and [who] manufacture[] and/or produce[] or sell[] vital war materials necessary to the active prosecution of the war . . . " The *Frankel* court found that despite evidence that petitioner carried gasoline and petroleum products throughout the world for the War Shipping Administration, *id.* at 276, 56 N.Y.S.2d 727, petitioner "is not a 'war contractor' within the meaning and intent [of the statute]; it is not engaged in manufacturing, producing or selling vital war materials necessary to the active prosecution of the war; its business,

admittedly, is solely that of operating a fleet of tankers . . . ." *Id.* at 276, 56 N.Y.S.2d 727.

The above cases show that the phrase "in the prosecution of the war" (or its equivalent) was well known and had been interpreted in judicial decisions for over 60 years before the signing of the Peace Treaty. All of the decisions interpreted the phrase *narrowly*, limiting its meaning to activities that are part and parcel of the war effort and leaving intact claims outside of that scope. Activities tangential to a war were never found to be "in the prosecution of the war." These authorities demonstrate that, contemporaneously with the negotiation of the Treaty, the phrase "in the prosecution of the war" was given a limiting, rather than a broad, construction, and establish that the waiver in the Treaty should likewise be read narrowly rather than broadly. *See Geofroy v. Riggs*, 133 U.S. 258, 272 (1890) ("where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred")

If the drafters of the Peace Treaty had intended a waiver of all claims of nationals of the Allied Powers arising during the war, the Treaty would not have used the limiting language of "in the prosecution of the war," but rather more expansive language as they had in Article 19 and other provisions throughout the Treaty. The specific use of the narrow terminology in Article 14(b), in light of the previous court decisions confirming the limited meaning of such terminology, shows that Article 14(b) was not meant to extinguish claims based upon activities of the private Japanese corporations merely because such activities were committed by the corporations during wartime.

Whether Respondents' conduct was in the prosecution of the war raises issues of fact which preclude dismissal. If the United States Supreme Court refused to concede a blanket participation in the war by all Japanese companies and instead looked at the facts specific to a company, the Court below was obliged to do likewise.

III. The Rights of Petitioners That Have Been Violated by Respondents are *Jus Cogens* or Peremptory Norms of International Law That Are So Fundamental They Cannot Be Abrogated by Any Treaty or Agreement

Principles of international law known as "*jus cogens*" or "peremptory norms" incorporate values that are so central to the international community that no country may diverge or derogate from them. All nations are bound by *jus cogens* principles, regardless of consent, because "universal norms constituting *jus cogens* transcend such consent." *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 715 (9th Cir. 1992). *See also* Vienna Convention, arts. 53,[2] 64[3](stating that treaty provisions in violation of

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[2] Article 53 of the Vienna Convention on the Law of Treaties states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[3] Article 64 of the Vienna Convention on the Law of Treaties provides that:

(Continued on following page)

jus cogens norms are void); *The Schooner Amistad*, 40 U.S. (15 Pet.) 518, 553, 595-96 (1841) (treaty with Spain could not be invoked to require the return of fugitive slaves because "where human life and human liberty are in issue, and constitute the very essence of the controversy, a [treaty pertaining to ships and cargo] could never have intended to . . . deprive foreigners of the protection given them . . . by the general law of nations"); *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (recognizing that *jus cogens* rules "[a]re nonderogable and peremptory, enjoy the highest status within customary international law, are binding on all nations and cannot be preempted by treaty"); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939-40 (D.C. Cir. 1988) (describing *jus cogens* as an elite subset of the norms recognized as customary international law).

Slavery and the slave trade, torture, summary execution, disappearance, prolonged arbitrary detention, genocide and systematic racial discrimination all constitute *jus cogens* violations. *Siderman,* 965 F.2d at 715-16 (*citing* Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. n (1987)). Indeed, enslavement was classified by the Nuremberg Tribunal as a "crime against humanity." *The Nuremberg Trial*, 6 F.R.D. 69, 130 (Int'l Military Tribunal 1946). Private citizens and corporate entities were criminally prosecuted at Nuremberg for utilizing slave laborers in the *Industrial Cases. See United States of America v. Alfred Felix Alwyn Drupp von Bohlen*

"[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

und Halbach, IX Trials of War Council Law No. 10 (1950) (finding criminal liability because the company was a private profit making institution and defendants independently sought to improve their profit margin by increasing production with slave labor); *United States v. Friedrich Flick,* VI Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council No. 10 (1952) (finding criminal culpability for two defendants who took the initiative to increase the company's production of freight cars and attempted to further use of slave labor to accomplish this end); *United States of America v. Carl Krauch,* VIII Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1179 (1952) (finding criminal liability for members of chemical and pharmaceutical company for their actions in constructing a synthetic rubber plant adjacent to Auschwitz). *See also* Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 Temp. Int'l & Comp. L.J. 173 (1995).

The crime of slavery is thus classified as a universal crime, and "enslavement [is] to be opposed and punished, wherever [it] may have been committed." *Prosecutor v. Tadic*, Int'l Crim. Tribunal for the Former Yugoslavia, IT-94-1-AR72 (Appeals Chamber, Oct. 2, 1994), *reprinted in* Jordan J. Paust, Joan M. Fitzpatrick, and Jon M. Van Dyke, *International Law and Litigation in the U.S.* 452, 453 (2000) (quoting from *General Wagener,* Revista Penale 753, 757 (Sup. Mil. Trib., Italy 1950)). Slavery includes forced labor. *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (citing *Siderman de Blake*, 965 F.2d at 717)). Civil liability for the use of slave labor is established by showing that a private party "participated [or cooperated] in the forced labor practices." *Id.* at 1310.

International law is part of the law of the United States. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815); *Filartiga v. Pena-Irala*, 630 F.2d 876, 886-87 (2d Cir. 1980); *Fernandez-Rodriguez v. Wilkinson*, 505 F. Supp. 787, 795-800 (D. Kan. 1980); Paust, Fitzpatrick, and Van Dyke, *supra,* at 110-33; Jordan J. Paust, *International Law as Law of the United States* 5-9 (1996). United States courts are bound to apply treaties ratified by the United States as well as customary international law. United States Constitution, arts. III, § 2, VI, cl.2; Paust, Fitzpatrick, and Van Dyke, *supra*, at 110-33, 345-60, 369-73; Paust, *supra*, at 5-9, 51-64, 81-101, and numerous references cited therein. United States courts are also obliged to interpret federal statutes and executive pronouncements to be consistent with customary international law. *See, e.g.*, *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); 1 Op. Att'y Gen. 26, 27 (1792); Paust, *supra*, at 34 n.37, 107-08 n.9; Paust, Fitzpatrick, and Van Dyke, *supra*, at 141-42, 283, 438, 635.

The United States Supreme Court has never ruled on the issue of whether the government may waive the *jus cogens* claims of its citizens. However, several decisions of the Supreme Court make it clear that in those rare instances where the United States waives **commercial** claims for violations of international norms, the United States must compensate the holders of the claims notwithstanding any treaty to the contrary. The most important decision in this regard is *The Paquete Habana*, 175 U.S. 677 (1900), which is most often cited for the proposition that international law is part of United States law. In *The Paquete Habana* Cuban nationals sued the United States

for seizing and selling two coastal fishing vessels during the Spanish American War. The Supreme Court held that the seizure and sale were violations of customary international law and the Cuban nationals were entitled to damages notwithstanding the wartime actions of the United States in blockading the harbors of Cuba and the treaty ending the war.

Two other decisions bear upon what powers the United States has in concluding treaties that may impact on the **commercial** claims of its nationals. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 279 (1796) the United States Supreme Court upheld the validity of a pre-Revolutionary War debt owed by a Virginia citizen to a British citizen notwithstanding a Virginia statute that nullified debts to British citizens if the amount of the debt was paid into the State treasury. In doing so, the Court upheld the Treaty of Paris of 1783 and the right of the new nation to preserve debts that may have been nullified by the States. Justice Chase rejected the idea that a government could waive private claims without compensation to the claimants:

> That Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but the immutable principles of justice; the public faith of the States, that confiscated and received British debts, pledged to the debtors; and the rights of the debtors violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public. This principle is recognized by the Constitution, which declares, "that private property shall not be taken for public use without just compensation". See Vattel. Lib. 1. c. 20. s. 244.

Id. at 245. Justice Chase's citation to "the immutable principles of justice" supports the conclusion that the Federal government cannot waive claims, even as part of a peace settlement, without compensating those whose claims have been violated.[4] Justice Iredell wrote in the same case that if Congress had given up the rights of private persons in a peace treaty "as the price of peace," the private individuals whose "rights were sacrificed" might well "have been entitled to compensation from the public" for their loss. *Id.* at 279.

Jus cogens claims stand on a different footing than commercial claims. They are ordinal rules of civilization which no nation can derogate or waive. The vindication of *jus cogens* claims is as essential to justice as is the payment of compensation. " . . . *[J]us cogens* (or "compelling law") enjoy the highest status in international law and prevail over both customary international law and treaties." *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988).

> Such basic norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, they may well restrain our government in the same way that the Constitution restrains it.

Id. at 941.

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[4] *See also* 3 U.S. at 229 ("It is admitted, that Virginia could not confiscate private debts without a violation of the modern law of nations. . .") and *id.* at 242 ("If the treaty had been silent as to debts, and the law of Virginia had not been made, I have already proved that debts would, on peace, have been revived by the law of nations").

IV. The Ninth Circuit Erred in Holding That Petitioners' Claims Are Barred by the Statute of Limitations

Following its discussion of the War power, the Ninth Circuit concluded that in any event Petitioners' claims are barred by the statute of limitations. The Ninth Circuit ruled that it would have to apply the statute of limitations which California would apply, 317 F.3d at 1027, but inexplicably concluded that the longer statute of limitations of section 354.6 was trumped by the shorter statutes of limitations otherwise provided under California law. 317 F.3d at 1028. This analysis errs, because it is purely a question of California law to determine what statute of limitations shall apply, and California already made this determination by providing for an extension of the statute of limitations for Petitioners' claims. Rather than pay proper deference to California, the Ninth Circuit abrogated California's effort to provide a forum for Petitioners' claims. This was error and mandates granting of this petition.

V. Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH W. COTCHETT
STEVEN N. WILLIAMS
COTCHETT, PITRE, SIMON & MCCARTHY
840 Malcolm Road
Burlingame, CA 94010
650-697-6000

LOURDES SANTOS TANCINCO
TANCINCO LAW OFFICE
One Hallidie Plaza,
Suite 818
San Francisco, CA 94102
415-397-0808

MICHAEL E. WITHEY
STRITMATTER KESSLER WHELAN WITHEY COLLUCIO
200 Second Avenue West
Seattle, WA 98119
206-448-1777

ROBERT HARWOOD
WESCHSLER HARWOOD LLP
488 Madison Avenue,
8th Floor
New York, NY 10022
212-935-7400

Counsel for Petitioners

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